No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

CARL B. WILLIAMS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT
AND
BRIEF IN SUPPORT THEREOF

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SUBJECT INDEX

	Page
Petition for a Writ of Certiorari	2-10
Summary statement of the matter involved	2-4
Statement of jurisdiction	5
Reasons relied on for allowance of the writ	7
Prayer for Writ	9
Brief in support of petition	11
Jurisdiction	11
Statement of the case	12
Specification of errors	13
Summary of argument	13-14
Point 1. Conflict with Supreme Court and federal decisions	14-17
Conclusion is untenable	18
Point 2. Limitations upon sections involved	19
Implied repeal of S. 458, 18, U. S. C.	20
Point 2. (a) Carnal knowledge not re-defined	26
S. 548, amended, does not repeal S. 458	28
Rape and carnal knowledge distinguished	29
Legislative history, 1932 amendment, S. 548	33-40
Application of Indian tribal laws	43
Summation	44
Conclusion	45

TABLE OF CASES CITED

Chavez v. United States, 290 U. S. 357, 78 L. Ed. 360	8, 13, 26
Commonwealth v. Exler, 89 A. 968	32
Davis v. Beason, 133 U. S. 333, 33 L. Ed. 637	23
Ex-parte Hart, 157 F. 130	8, 18
Ex-parte Kang-Gi-Shun-Ca, 109 U. S. 557, 27 L. Ed. 1031	29
Ex-parte Webb, 225 U. S. 663, 56 L. Ed. 1248	29

(TABLE OF CASES CITED—Continued)

Page

Franklin v. United States, 216 U. S. 559, 54 L. Ed. 615 17

Gutterson v. Pearson 189 N.W. 458, 24 ALR 519 23

Hamilton Shoe Co. v. Wolf Bros. 240 U. S. 251, 60 L. Ed. 629 7

Johnson v. Yellow Cab Transit Co. 321 U. S. 383, 88 L. Ed. 814 19

Lau Ow Bew v. United States, 144 U. S. 47, 36 L. Ed. 340 7

Magnum Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922 7

Melton v. State S.W. 2d 662 30

Middletown v. Hartford Acc. & Indem. Co., 119 F. 2d 821 28

Nevada v. Pickett, 11 Nev. 255, 21 Am. Rep. 754 31

Oliver v. United States, 230 F. 921 27

People v. Martin, 47 N. Y. S., 2d, 883 19

People of Puerto Rico v. Shell Co., 302 U. S. 253, 82 L. Ed. 235 19

Rodgers v. United States, 185 U. S. 83, 46 L. Ed. 816 42

Sage v. State, 22 Ariz. 151, 195, P. 533 31

Sigerella v. State, 74 A 1081 29

Smith v. United States, 83 F. 2d. 631 29

Taylor v. State, 55 Ariz. 29, 97, P. 2d. 927 31

Townsend v. Little 109 U. S. 504, 27 L. Ed. 1012 42

United States v. Carter, 84 F. 622 ..... 8, 17

(TABLE OF CASES CITED—Continued)

Page

United States v. Press Publishing Co. 219 U. S. 1, 55 L. Ed. 65 ..... 8, 16

United States v. Resnick, 209 U. S, 207, 81 L. Ed. 127 21

Washington v. Miller, 235 U. S. 422, 59 L. Ed. 295 28

TABLE OF STATUTES CITED

Judicial Code, S. 240 (a) - S. 347, 28, U.S.C. (Certiorari) 5

18, U.S.C.,-S. 453 (Manslaughter) 25

18, U.S.C.,-S. 458, (Carnal knowledge) 15, 20

18, U.S.C.,-S. 468, (Assimilative Crimes) 14

18, U.S.C.,-S. 516, (Adultery) 24

18, U.S.C.,-S. 548, (Offenses of Indians) 26

25, U.S.C.,-S. 217, (Punishment of crimes extended) 26

Arizona Code, 1939, S. 43 - 4901 (Rape) 15

ENCYCLOPEDIAS

25 R.C.L. "Statutes" S. 169 23

50 Am. Jur. "Statutes" S. 228 21

50 Am. Jur., "Statutes" S. 567 21

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UPON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Carl B. Williams, in support of his petition for a writ of certiorari to review the final judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered March 30, 1945, and denial of a petition for re-hearing entered May 14th, 1945, respectfully shows:

A
SUMMARY STATEMENT OF THE MATTER INVOLVED

This proceeding was initiated by an indictment by the United States on March 23, 1944, in the District

Court of the United States, for the District of Arizona, as cause No. C6759. The indictment by its caption charged a violation of 18 U. S. C., S. 548, (Rape), while the tenor of the body of the indictment charged that on or about the 10th day of December, 1943, upon and within the limits of the Colorado River Indian Reservation in the District of Arizona, the defendant did have carnal knowledge of a female Indian under the age of eighteen (18) years, the said female Indian not then and there being the wife of the defendant. (R. 2).

The proceeding came on regularly for trial on June 21, 1944. (R. 6).

The facts developed at the trial, briefly stated, show that petitioner is a member of the Caucasian race; that he has no Indian blood whatsoever; that he is a mechanic and clerical helper; that he is married and has one son about the age of fifteen (15) years; that the defendant first made his appearance around Parker, Arizona, sometime in the spring of 1942, Parker, Arizona, being a village adjacent to the Colorado River Indian Reservation in said District of Arizona.

The evidence disclosed that the defendant, in addition to his usual work, was a missionary of the Nazarene Church, and that in connection therewith, he sought to enlighten the Indians with reference to religious tenets of said church; (R. 27); that during the latter part of 1943, he established a missionary church on the Colorado Indian Reservation near Parker and within the District of Arizona.

Among the Indians, there enters as the principal in the case, one Geraldine Rose Ameelyenah, an Indian girl who had become a disciple of the Church. Sometime after the establishment of the mission, the defendant began printing a church newspaper. It became the province of Geraldine Rose to assist the defendant in his work (R. 24,).

The Government evidence tended to show that on or about the early evening of December 3, 1943, defendant called at the home of Geraldine Rose and had her accompany him, together with two Indian boys, in a "pickup truck" to the missionary church where some work on the newspaper was to be done. (R. 24, 25).

By this government testimony, it appears that sometime after dark, on said evening, the group of four departed from the church, the defendant taking the two Indian boys to their respective homes and later, driving away on a country road with the girl, Geraldine Rose, where eventually, around 10 o'clock in the evening, they stopped near what is described as "the old Gonzales place',' which is admitted to be on the Colorado Indian Reservation.

Near this place, the defendant and the Indian girl in question got into the rear part of the "pickup" and there the defendant is alleged to have had sexual intercourse with Geraldine Rose. Thereafter, the defendant-petitioner took the girl to her home (R. 24, 25).

The Government developed evidence to the effect that Geraldine Rose, at the time of the commission of

the alleged act, was under eighteen (18) years of age, but over the age of sixteen (16) years, (R. 24, 25). This evidence was uncontradicted.

Appellant's plea of "Not Guilty" was founded on evidence to the effect that at the time of the commission of the alleged act, he was at his own home preparing a sermon to be delivered at the church the following Sunday (R. 27).

THE CONVICTION AND SUBSEQUENT PROCEEDINGS

Upon these facts, the defendant was convicted (R. 4) and judgment and sentence were pronounced on June 27, 1944, (R. 12).

An appeal was taken to the Circuit Court of Appeals for the Ninth Circuit, cause No. 10825. Upon appeal in the Court below, petitioner contended:

(1) That the indictment did not state a crime under the laws of the United States of America, (R. 30, 31) and hence that the District Court was without jurisdiction;

(2) That neither the offense charged nor proved constituted any wrong, crime or violation of Federal Law on the part of the defendant under all the circumstances of the case. (R. 30, 31). These contentions were rejected by the majority opinion of the Appellate Court on March 30, 1945, wherein a dissenting opinion was also filed in the case. (R. 46).

Thereafter, a petition for rehearing was filed in the United States Circuit Court of Appeals for the

Ninth Circuit, and in due time, the same was denied. (R. 48). This petition is filed within thirty days next after denial of petition for rehearing on May 14th, 1945.

B

STATEMENT OF THE JURISDICTION OF THIS COURT

(1) STATUTORY PROVISION BELIEVED TO SUSTAIN THE JURISDICTION.

The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, S. 1, 43 Stat. 938 [U. S. C., Title 28, S. 347 (a)], and under the same Act, ch. 229, S. 8, 24 Stat. 940 (U. S. C., Title 28, S. 350).

(2) THE DATE OF THE JUDGMENT TO BE REVIEWED.

The judgment of the Circuit Court of Appeals for the Ninth Circuit affirming the conviction of petitioner was entered on the 30th day of March, 1945, (R. 48).

This petition, with supporting brief, and the certified record, are filed within thirty days next after denial of petition for rehearing.

(3 STATEMENT OF THE NATURE OF THE CASE AND THE RULINGS OF THE CIRCUIT COURT OF APPEALS BRINGING THE CASE WITHIN THE JURISDICTION OF THIS COURT.

The nature of the case (a prosecution for the offense of carnal knowledge or rape) has been stated ante. The Circuit Court of Appeals ruled:

(1) That, while S. 458 of Title 18, U. S. C. defined the offense of carnal knowledge as an act of sexual intercourse with a female under the age of sixteen (16) years and although the female in this instance was over the age of sixteen (16) years, that nevertheless, the defendant was guilty of the crime of rape for the reason that the offense was regarded as a crime in view of S. 468, 18, U.S.C. by reason of the fact that S. 43-4901, Arizona Code Annotated, 1939, defined the act as being that of rape, in that the female in question was under the age of eighteen (18) years; and hence, that the defendant was punishable under the indictment;

(2) That the indictment properly stated an offense and that the trial court was vested with jurisdiction (R. 45-46;

(3) in effect, that S. 458, U. S. C. does not in any manner limit S. 468, 18, U. S. C. (R. 41-45).

Each of such rulings is reviewable by this Court under the appropriate statutory provisions noted.

(4) CASES BELIEVED TO SUSTAIN THE JURISDICTION OF THIS COURT.

This Court is vested with jurisdiction under the statutory provisions heretofore specified. The cases submitted by petitioner as the basis for the exercise of such jurisdiction to review the judgment below, are cited hereafter in connection with petitioner's reasons for the allowance of the writ of certiotari, and next immediately following this paragraph.

Magnum Co. v. Coty, 262 U. S. 159, 67 L. Ed. 922

Hamilton Shoe Co. v. Wolf Bros., 240 U. S. 251, 60 L. Ed. 629

Lau Ow Bew v. U. S., 144 U. S. 47, 36 L. Ed. 340

C

THE QUESTION PRESENTED

(1) Was the indictment under which the petitioner was brought to trial valid and did it state an offense cognizable under the laws of the United States? (R. 2).

(a) Does S. 458, 18, U. S. C. limit the application of S. 468, 18, U. S. C.?

(b) Was the offense charged, one of "rape" or of "carnal knowledge"? (R. 2 and 44).

(2) Did the offense charged and the evidence offered in support thereof constitute an offense by the petitioner within the meaning of either S. 468, 18, U. S. C. or S. 548, 18, U. S. C. (R. 45, 46).

D

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

(1) In ruling (R. 45) that the conduct of petitioner, in carnally knowing on an Indian reservation, Geraldine Rose Ameelyenah, a female Indian, not the wife of petitioner, and under the age of eighteen (18) years, but over the age of sixteen (16) years, constituted the offense of rape within the meaning of S. 468, 18, U. S. C., and S. 43-4901, Arizona Code Anno-

tated, 1939, the Circuit Court of Appeals (Healy, Justice, dissenting) has decided a Federal question in a way probably in conflict with applicable decisions of this Court, e.g. violations of S. 468, 18, U. S. C., viz: *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. Ed. 65, and has rendered a decision in conflict with decisions of other Circuit Courts of Appeal on the same matter, e.g.—construction of S. 468, 18, U. S. C., viz: *United States v. Carter*, 84 Fed. 622.

(2) In ruling (R. 45) that S. 468, 18, U. S. C. is applicable in the instant case, the Circuit Court of Appeals has decided an important question of general law in a way probably untenable and in conflict with the weight of authority, viz: *Ex Parte Hart*. 157 Fed. 130.

(3) In ruling that S. 548, 18, U. S. C. is not applicable in this case because the petitioner is not an Indian, (R. 42), the Circuit Court of Appeals has decided a Federal question in a way probably in conflict with decisions of this Court, viz: *Gregorio Chavez* v. *United States*, 290 U. S., 357, 78 L. Ed. 360,

(4) Or, if the ruling below is not in conflict with the foregoing decisions, as petitioner contends, the Circuit Court of Appeals has decided an important question of Federal law which has not been, but should be, settled by this Court, viz: (a) Whether or no an act of sexual intercourse with a female over the age of sixteen (16) years and under the age of eighteen (18) years, at a place over which the United States has exclusive jurisdiction, and when such female is not the wife of the man involved, is a

violation of United States laws? (b) whether S. 458, 18, U. S. C. limits the application of S. 468, 18, U.S.C.?

The ruling below is unmistakably in conflict, at least in principle, with the doctrine of the Ex-parte Hart case as heretofore judicially construed, and contrary to the doctrine enunciated in the Press Publishing Company case; hence, if, contrary to the contention of the petitioner, the ruling below is not in conflict with the cases noted, it presents an important question of Federal law which should be settled by this Court.

CONCLUSION

Each of the facets of the question presented is of grave and public importance. Unless the majority ruling below is reviewed, the law relating to the crime of rape and carnal knowledge, as it concerns those offenses when committed on territory within the exclusive jurisdiction of the United States will be left in doubt and confusion. The question involved presents a matter of fundamental importance, which, in the public interest ought to be resolved.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of record and of the proceedings of said United States Circuit Court of Appeals in the case numbered and entitled on its docket No. 10825, criminal, Carl B. Williams, Appellant v. United States of America, Appellee, to the end that this cause may be reviewed and determined by this Court as provided for by the sta-

tutes of the United States, and that the judgment of said Circuit Court of Appeals be reversed by this Court, and your petitioner prays that the certified copy of the record and proceedings of the said United States Circuit Court of Appeals for the Ninth Circuit filed with this petition, may be treated as a return to said writ of certiorari, and your petitioner prays that he may have such other and further remedies in the premises as to the Court may seem appropriate and in comformity with law.

CARL B. WILLIAMS,
Petitioner

M. J. DOUGHERTY,
Counsel for Petitioner

JOHN F. CONNOR,
Of Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No.....

CARL B. WILLIAMS, Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Ninth Circuit is not officially printed at the time of filing this brief. However, the decision of the Court was declared and announced on March 30, 1945, and is copied in the Transcript of Record. (R. 41-47). The dissenting opinion of Hon. William Healy, Circuit Judge, is found at page 46 of the record.

II.

JURISDICTION

1. The date of the judgment to be reviewed is March 30, 1945, (R. 41-47), and the date of denial of petition for re-hearing is May 14, 1945, (R. 48).

2. The grounds upon which the jurisdiction of this Court is invoked are as follows:

(a) That the majority decision of the Court below is in conflict with applicable decisions of this Court;

(b) That said decision is in conflict with decisions of other Circuit Courts of Appeal on the same matter, e.g. the construction of S. 468, 18, U. S. C.;

(c) That if the ruling below is not in conflict with applicable decisions of this Court and in conflict with decisions of other Circuit Courts of Appeal on the same matter, that the Circuit Court of Appeals has decided an important question of Federal law which has not been, but which should be, settled by this Court. (See "D" of Petition for Certiorari, page 7, made a part hereof.)

3. The statutory provisions under which the jurisdiction of this Court is invoked are: Judicial Code S 240 (a) as amended by the Act of February 13, 1925, 43 Stats., 938.

III.

STATEMENT OF THE CASE

A full statement of the case has been heretofore given in the Petition for Certiorari under heading "A", and in the interest of brevity, the statement is not here repeated (see pages 1 to 5, Petition for Certiorari, made a part hereof.)

IV.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in finding and holding that the indictment under which appellant was convicted and sentenced charges an offense against the United States.

2. The Circuit Court of Appeals erred in finding and holding that the petitioner was guilty of the offense of rape within the meaning of S. 289 of the Criminal Code, 18, U. S. C., S. 468 and 43-4901, Arizona Code Annotated, 1939.

3. The Circuit Court of Appeals erred in finding and holding, in effect, that S. 289 of the Criminal Code, 18, U. S. C., S. 468, is not limited by S. 279 of the Criminal Code, 18, U. S. C., S. 458.

4. The Circuit Court of Appeals erred in finding and holding that section 548, 18, U. S. C. is not applicable solely for the reason that petitioner is not an Indian. *Gregorio Chavez c. United States*, 290 U. S. 357, 78 L. Ed. 360.

SUMMARY OF ARGUMENT

Italics appearing in Argument following are supplied by Counsel, unless otherwise indicated.

I

The decision below is contrary to and in conflict with prior decisions of this Court and with decisions of other Circuit Courts of Appeal on the same matter, for the reason that the indictment and proof, neither charged nor sustained an offense cognizable under Federal statutes. United States v. Press Publishing Company, 219 U. S.

1, 55 L. Ed. 65; Ex Parte Hart, 157 Fed. 130; United States vs. Carter, 84 Ed. 622.

II

Properly construed as to its legal effect, section 458, 18, U. S. C. is a limitation upon both sections 468 and 548, 18, U. S. C. insofar as the offense of carnal knowledge is concerned.

(a) Section 548, 18, U. S. C. was not intended by Congress to re-define carnal knowledge in a manner at variance with section 458, 18, U. S. C.

Point 1

Conflict with prior Supreme Court and Federal decisions.

Section 289 of the Criminal Code, section 468, 18, U. S. C., sometimes called the "Assimilative Crimes Act", provides:

> "Whoever, within the territorial limits of any State, *** but within or upon any of the places now existing or hereafter reserved or acquired, described in (S. 272 of the Criminal Code, 18 U. S. C. A. S. 451), shall do *** any act or thing which is not made penal by any laws of Congress, but which if committed *** within the jurisdiction of the State *** in which such place is situated, by the laws thereof in force on February 1, 1940, and remaining in force at the time of the doing *** of such act or thing, would be penal, shall be deemed guilty of a like offense and be subject to like punishment."

Section 279, Criminal Code, section 458, 18, U. S. C., provides:

> "Whoever shall carnally and unlawfully know any female under the age of sixteen years *** shall, for the first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years."

Section 43-4901, Arizona Code, 1939, insofar as it is material to this case, provides:

> "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, in any of the following circumstances: Where the female is under the age of eighteen (18) years. *** Rape is punishable by imprisonment in the state prison for life or for any term of years not less than five (5)".

Section 458, above set out projects the elements which constitute the offense of carnal knowledge. One of the essential elements is the age of the female. Upon this specific element Congress has legislated by virtue of said section. There is nothing in the Assimilative Crimes Act to indicate that Congress intended to eliminate the age element of the offense of carnal knowledge, as prescribed by Congress, and to substitute therefor a new element, viz., a higher age limit under the Statutes of the respective states.

The Assimilative Crimes Act, in essence provides that where any act is not declared penal by Con-

gress, but is declared penal by the law of the state in which the act takes place, that such act will then be regarded as being an offense against the United States.

It is the contention of petitioner that the act with which he is here charged, namely that of unlawful carnal knowledge or sexual intercourse with a female, is specifically provided for by the Congress and that hence the provisions of section 468 do not apply. So far as can be learned by counsel for petitioner, this is a case of first impression, and no applicable precedents with respect to the commission of the offense of carnal knowledge can be found.

However the construction of section 468, 18, U. S. C., is involved, and the legal effect of such section has been passed upon by this Court in a manner which Counsel respectfully suggests is directly in conflict with the tenor of the decision of the Circuit Court of Appeals.

Said this Court in *United States v. Press Publishing Company*, 219 U. S. 1, 55 L. Ed. 65, (at page 67, Col. 1),

> "It is certain on the face of the quoted section, that it exclusively relates to offenses committed on United States Reservations, etc. which are 'not provided for by any law of the United States,' ***** that is so say, while the statute leaves no doubt where acts are done on reservations which are expressly prohibited and punished as crimes by law of the United States, that law is dominant and controlling, ******"

With respect to the construction of said section now under consideration, Counsel likewise respectfully invites the attention of this Court to its decision concerning said section, in *Franklin v. United States*, 216 U. S. 559, 54 L. Ed. 615 where at page 569, Col. 2, the Court held in effect that section 468 provided for the adoption of:

> "The criminal laws then existing in the several states *****, insofar as said laws *were not displaced by specific laws enacted by Congress.*"

Conflict With Other Circuit Courts

Petitioner suggests that the decision below is in direct conflict in principle with the Circuit Court for the Southern District of New York as declared in *United States v. Carter*, 84 Fed. 622.

There defendant Carter had been indicted for murder under sections 5391 (now 468, 18, U. S. C.) and 5339 (now 451-452, 18, U. S. C.). Defendant challenged jurisdiction of the Federal Courts on the grounds that the offense had been committed in the State of New York, said offense having been committed on a fuel ship moored in a dock within the State of New York, but the dock having been ceded by New York to the United States.

The Court held that the United States had jurisdiction of the offense by virtue of the fact that the act was committed within its jurisdiction and because the crime of murder was specifically denounced by the Federal statutes.

It would follow that if there had been no United States law punishing for murder under the circumstances of the case, that section 468, 18, U. S. C. could have been properly invoked, and the law of New York applied within the Federal Courts.

The Conclusion Is Untenable

Counsel for petitioner likewise suggests that the matter of *Ex Parte Hart*, 157 Fed. 130, also decided by the Ninth Circuit is directly in conflict and at variance with the purport of the decision below, and, that hence the Ninth Circuit Court has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

In the Hart case, there was involved the crime of incest committed by an Indian with his daughter, both being Indians.

It was the contention of Government Counsel, among other theories advanced, that the act of July 7, 1898, (substantially similar to now section 468, 18, U. S. C.) could be applied to the facts in the case.

The Court refused to adopt this view, and held, in effect, that inasmuch as the act of incest is not only prohibited by general United States law, but its punishment expressly provided for, the provision of section 468, 18, U. S. C., did not apply. (Page 133 of the Opinion.)

The Court went on further to say:

> "The offense of incest is, therefore, excepted out of this statute, (that is, section 468, title 18)

because as it appears, it is not only defined, but the punishment thereof is prescribed, by a law of Congress." (Page 134 of the Opinion).

Generally, with respect to petitioner's contention that section 468, 18, U. S. C. is to be applied only where the acts complained against are not made penal by any act of Congress, see:

"*People of Puerto Rico v. Shell Company*, 302 U. S. 253, 82 L. Ed. 235;

Johnson v. Yellow Cab Transit Co., 321 U. S. 383, @ 389—391 and cases there cited. 88 L. Ed. 814;

People v. Martin, 47 N. Y. S., 2d, 883."

Point 2.

Section 458, 18, U. S. C. limits both sections 468 and 548, 18, U. S. C. with respect to the offense of carnal knowledge.

Now the precise question involved in this action is whether the act or offense charged is denounced as a crime by Federal Statutes. If it is so denounced, said section 468 does not apply. If it is not in terms denounced, then section 468 does apply.

This leads us to enquire, what is the substantial wording of the indictment?

The indictment (R. 2) states in substance that the petitioner,

" * * did then and there wilfully, unlawfully and feloniously ravish and carnally know Geral-

dine Rose Ameelyenah, * * * * a female person and an Indian * under the age of eighteen (18) years, * "

Section 458, 18, U. S. C. provides

"Whoever shall carnally and unlawfully know any female under the age of sixteen (16) years * * * shall, * * * be imprisoned * * * * * *"

Does not the said section 458, denounce in terms the act of carnal knowledge? How then does section 468 apply?

The Government concedes that the Federal Statutes denounce the offense when committed with a female under sixteen (16) years. It contends, however, that there is no federal law denouncing the offense when committed with a female *over* the age of sixteen (16). Therefore, it is asserted that S. 468, 18, U. S. C. applies.

The Government's Position Effects An Implied Repeal of S. 458, 18, U.S.C.

This kind of reasoning effects an implied repeal of section 458. Either the Congress has declared the offense under consideration as a crime when committed with a female under sixteen (16) and has permitted the allowable inference that when committed with a female *over* sixteen (16), that such female could lawfully give her consent to such act, or that she could not so consent unless the State law in effect where the act took place permitted her to give lawful consent.

The result of the decision below, is that under section 468 herein discussed a female *over* sixteen (16) cannot lawfully give her consent under Federal law. We thus have a conflict between what Congress intended and what the lower Court indicates it ought to have intended.

Congress has declared the essential elements constituting the offense, and, therefore, the State law, as embraced in section 43-4901, Arizona Code, 1939, could, in no event, apply. To attempt to do so would be the result of distortion and illogical extension of the meaning of the Statute and the end result would be legislation by judicial decree.

> "The Statute being penal in its intendment, it is to be strictly construed and not extended by judicial construction beyond what the legislature has written."

United States v. Resnick, 209 U. S. 207, 81 L. Ed. 127.

An implied repeal by judicial construction is to be avoided.

> "It is not within the province of a Court in the course of construction of a statute, to make or supervise legislation."****** "To depart from the meaning expressed by the words of a statute, is to alter it, and is not construction, but legislation."

50 Am. Jur., **Statutes**, S. 228.

> "General rules relating to repeal ** by implication are * applicable to penal statutes ***"

50 Am. Jur., **Statutes**, S. 567.

In summation of this aspect of the argument, petitioner contends that a process of logical reasoning leads but to the conclusion that in the instance here under consideration, the offense is not covered by S. 468, 18, U. S. C. The proper interpretation of said section, by its own terminology excludes its application.

The enumeration of the precise and specific figure of sixteen (16) years of age, contained in S. 458, 18, U. S. C., would seem to carry with it the implication of a purpose to exclude higher ages. Some implication and limitation ought to attach to the construction of section 468, by reason of the fact that Congress enacted section 458 and did not later repeal it. Were the decision of the Lower Court to stand, a repeal would be implicit in the majority conclusion of the Court.

Expressio Unius Est Exclusio Alterius

Here, certainly, it occurs to Counsel, is the proper application for the maxim, Expressio Unius Est Exclusio Alterius.

However, the Government will undoubtedly contend that there is no repeal. But it is on the horns of dilemma. As was pointedly made clear in the dissenting opinion below, the Government admits that in those states where by law the age of consent is fixed at a less mature age than sixteen (16), the Federal Statute, to wit, S. 458, 18, U. S. C. would cover; but in those states where an age higher than sixteen (16) is fixed by local law, then the Federal Statute could not be invoked, but the State Statute would apply by "adoption."

This is but to assert, that there is not a total repeal by implication and judicial construction, but only a partial repeal.

A partial repeal by judicial construction is as much at variance with precedent and logic as is an attempt at total repeal. In any event there results judicial usurpation of legislative functions. It would be needless to cite case law at length upon this contention, as the principle is fundamental.

> "The statute should not be construed to include cases omitted by the legislature."

Gutterson v. Pearson, 189 N. W. 458, 24 A. L. R. 519."

> "The presumption is always against the intention to repeal where express terms are not used ***** It would be *** unreasonable to suppose that a legislative body intended, by doubtful inference, to repeal salutary provisions in a very early statute, which in numerous enactments, it has cautiously preserved."

25 R.C.L., **Statutes**, S. 169.

We concede that section 45-4901, Arizona Code, is not attempted to be applied as State law as such, but yet the result of the application of section 468, here being considered is nevertheless to apply such State law by "adoption."

While the case is not precisely in point, we think that the reasoning in the decision of *Davis v. Beason*, 133 U. S. 333, 33 L. Ed. 637, at page 642, clarifies

somewhat the contention which we are attempting to advance, namely, that section 468 in the absence of express directions as to the repeal of section 458, did not effect a change or alteration of the latter provision.

> "The cases in which the legislation of Congress will supersede the legislation of a state or territory without specific provisions to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground."

It may not be amiss to consider the logical result of applying the majority conclusion below to hypothetical cases. The Federal Government by S. 516, 18, U. S. C., covers in generic terms, offenses relating to the commission of adultery and defines the ingredient elements of the offense.

Assuming, for purposes of argument, that some one of the 48 states should also provide and punish against the commission of the crime of adultery, but that in specifying the elements making up various grades of the crime that the commission of the offense by a *white* woman and a *black* man should according to local prejudices be regarded as more heinous and deserving of greater punishment.

Now assume further, that such act should be committed by the white woman and black man upon territory over which the United States had exclusive

jurisdiction. Would it be the contention of the Government that inasmuch as the Federal law only provided against the commission of adultery generally, but did not provide against the specific act of adultery between the black man and the white woman, that then section 516 would not apply but that section 468 should be invoked?

Section 453, 18, U. S. C. defines generally the elements constituting the crime of manslaughter. Assume that some one of the 48 states defined the killing of a human being while under the influence of intoxicating liquor as manslaughter, and assume further that such killing took place upon United States territory. Would the Government again contend that inasmuch as S. 453, 18, U. S. C. did not specifically enumerate as manslaughter, the act of killing while under the influence of intoxicating liquor, that then section 453 would not apply, and that the State Statute would apply by "adoption"?

We assert that these instances, show the complete fallacy of the conclusion reached by the Court below. The argument advanced by the Government, and sustained by the Court below falls of its own weight when it is followed to its logical conclusion.

The Congress spoke by virtue of S. 458, title 18, U. S. C. It asserted its own idea and its policy with respect to the age under which a female could not be presumed to give lawful consent to an act of sexual intercourse. It allowed the justifiable inference that *over* the age prescribed, a female could give lawful consent to such act. To hold otherwise would be in effect, to make of section 458, a concealed trap to

catch unwary victims. Either section 458 means what it says, or it doesn't, and the opinion below certainly results in a decision which is in conflict with applicable decisions of this Court and in conflict with decisions of other Circuit Courts of Appeal and is wholly untenable in theory and in practical application.

Point 2 (a)

Section 548, 18, U.S.C. Not Intended to Re-define Carnal Knowledge

Petitioner is not presently in the position to look a gift horse in the mouth. The Court below held that section 548 did not apply because petitioner is not an Indian. Because Counsel believes that S. 548, 18, U. S. C., as amended, would in a proper case apply, when read in conjunction with S. 217, 25, U. S. C. by virtue of *Gregorio Chavez v. United States*, 290 U. S. 357, 78 L. Ed. 360, it is therefore incumbent to touch upon this aspect so as to protect the rights of petitioner in the event that this Court should, contrary to petitioner's contentions, regard section 548 as being applicable.

The said section, as far as it is material here, provides:

> "**Section 548 (Criminal Code, Section 328.) Indians committing certain crimes; acts on reservation; rape of Indian.** All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous weapon, arson, burglary, robbery, and larceny, etc. ******

> *Provided further*[1] that as herein used the offense rape shall be defined in accordance with the laws of the state in which the offense was committed. *******"

Petitioner now puts the question as to the applicability of the above section to the facts of this case.

We therefore are concerned with what the Congress meant by the use of the term *rape*. Did it intend, by the use of such word, to comprehend the crime of carnal knowledge?

Defendant respectfully suggests that it did not, for to have done so would have resulted in an implied repeal of S. 458, 18, U. S. C., which as before stated gives definition to the essential elements constituting the crime of carnal knowledge under Federal jurisdisprudence.

It is the contention of petitioner that Congress intended to give definition to the crime of rape to supply an omission existent in the United States laws since the Act of March 3 1825, c. 65, 4 Stat. 115. That Act is now 457, 18, U. S. C., which reads as follows:

> "**Rape.** Whoever shall commit the crime of rape shall suffer death."

The Congress had never defined the crime of rape, and in not a few early cases, the question was raised as to the validity of said section in that the crime was not defined. The matter was put at rest in the case of *Oliver v. United States*, 230 Fed. 971, where this Court decided that the term rape, as used in the Sta-

[1] Italics as indicated by U. S. C. A.

tute, carried with it the common law definition of the crime.

Inasmuch as the meaning of rape at common law necessitated evidence as to force and lack of consent, it could often occur that convictions could not be obtained where the act of sexual intercourse had been had with mere suggestion of menace or force, or perhaps by fraud or deception or the use of intoxicants, but where force as such, could not be proved.

It was to cover these kinds of cases which accounts for the amendment as we shall hereinafter show, or in other words, it was to implement the common law definition of rape so as to include the elements of constructive force.

Was Section 458, Title 18 (carnal knowledge) repealed by 1932 amendment to Section 548, Title 18?

Defendant contends that the answer to the interrogatory is definitely in the negative. It is universally held that a general statute does not repeal, by implication, a special statute unless the conflict is plain and irreconcilable.

Middletown vs. Hartford Acc. & Indem. Co.
119 F. 2d. 821.

In *Washington vs. Miller*, 235 U. S. 422, 59 L. Ed. 295, where a question arose as to the repeal of a law having to do with whether or not a statute concerning descent and distribution of Indian lands was repealed by a later Act, the Court declared in deciding that the later Act did not impliedly repeal the earlier provision:

"In short, it was plainly a general statute and did not show that the attention of Congress was then particularly directed to the descent of the lands of the Creeks. On the other hand, Section 6 of the supplemental agreement and its two provisos dealt with that subject in specific and positive terms which made it certain that the Creeks and their lands were particularly in mind at the time. In these circumstances, we think there was no implied repeal and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both. (Citing cases.): Second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general. (Citing cases); and third, there was, in this instance, no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

Likewise, to this same effect, see *Ex Parte Kang-Gi-Shun-Ca*, otherwise known as *Crow Dog*, 109 U. S. 557, 27 L. Ed. 1031, *Smith v. United States*, 83 Fed. 2d 631; *Ex Parte Webb*, 225 U. S. 663, 56 L. Ed. 1248.

Rape and Carnal Knowledge Distinct Offenses

Sigerella v. State, 74 A. (Del.) 1081, covers the point. There the Court held c. 127 of the Delaware

Code, 1852, providing death for sexual abuse of a female under ten (10), or for rape, was not repealed by a later 1889 statute, providing a maximum punishment of seven (7) years for taking ***, receiving ***, or harboring a female or male under eighteen (18) for purposes of sexual intercourse, on the ground and for the reason that there was no inconsistency in the statutes and they could both stand without violence to each other.

Said the Court:

> "Our Statutes provide that every person who shall carnally know and abuse any female child under the age of ten (10) years shall be imprisoned * * * not less than seven (7) nor more than ten (10) years. The punishment for rape is life. Here are two distinct offenses."

Again, the same point is enunciated in *Melton vs. State*, 23 S.W. 2d (Tenn.) 662, where it was held that:

> "The Statute of 1871, providing against carnal knowledge of a female under ten (10) years of age or upwards, without her consent or by the administering of any substance providing stupor or weakness, etc., is not repealed by later statutes, (1893-1911) which together are supposed to cover all offenses relating to rape—there being no inconsistency in the co-existence of the two statutes."

While the Arizona Code, S. 43-4901, 1939 edition, defines rape as an act of sexual intercourse accomplished with a female under the age of eighteen (18)

years, and also includes within the definition the commission of the crime by force and constructive force, nevertheless, the Arizona Courts, in dealing with the subject distinguished between the crime of rape, (1) by force or where consent is obtained by fraud or deception and (2) where the crime is committed with a female under the age of eighteen (18) years; this latter being usually distinguished as "statutory rape." *Sage v. State*, 22 Arizona 151, 195 P. 533; *Taylor v. State*, 55 Arizona 29, 97 P. 2d 927.

While section 10124 of Nevada compiled laws, 1931-41, defines carnal knowledge of a female under the age of eighteen (18) as rape, nevertheless its case law makes a distinction between the offense of carnal knowledge and rape as is evident in the case of *Nevada v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754. The case is explicit upon the point. The Court first gave the common law definition of rape, as follows:

> "The carnal knowledge of a woman, forcibly and against her will," (4 Blackstone Comm. 210),

and then went on to observe:

> "It is obvious that here are two crimes differing essentially in their nature, though called by the same name. To one, force and resistance are necessary ingredients, while to the other they are not essential; * * * this is well settled in England, where, under the provisions of several statutes, the carnal knowledge of a female under ten (10) years of age, with or without her consent, is made a 'felony.' The statutory crime is not there denominated 'rape,' and the English judges have escaped the confusion of ideas which in this country has no doubt arisen from the fact that two

> essentially different crimes have been called by the same name, leading our Courts, in some instances, to attribute to the statutory rape all the qualities of common law rape." (See cases there cited.)

The case of *Commonwealth vs. Exler*, 89 A. (Penn.) 968, is analogous to the present point of discussion.

In that case, it appears that the defendant was indicted for the crime of murder, resulting from an attempted rape. There was no evidence of force or lack of consent and it appeared, for all that was known, that the female might have consented to the act; that her death could have occurred from shock or exposure. Nevertheless, because her death occurred while an alleged sexual act was being attepted, the defendant was prosecuted under a statute which defined murder by attempted rape, to be murder in first degree.

Upon appeal, the Appellate Court held that the word "*rape*," as thus used in the statute, was used in its common law sense, and that it did not include the act of statutory rape denounced by the Acts of 1887; that as a consequence, inasmuch as no force was used and that the female was capable of giving consent, that the crime was not murder in the first degree.

Congress Has Recognized the Distinction

Congress has declared that the crime of rape and the crime of carnal knowledge are separate and distinct offenses, as evidenced by the provisions of sections 457 and 458, 18, U. S. C. In view of the distinctions noted above by the Courts of the several

states and the separate sections of the United States Code covering on the subject, petitioner re-iterates that Congress did not intend by its definition of rape in accordance with the amendment of S. 548, 18, U. S. C., to include the offense of carnal knowledge.

Section 548, Title 18, U. S. C., has been in the United States Code for years. In such section, the Congress has enumerated certain crimes, and has provided that Indians committing said designated crimes shall be subject to the same laws and to the procedure of the same Courts as are all other persons committing any of the said mentioned crimes. At no time in the history of the said Act has the crime of "carnal knowledge" been included. Among the sexual offenses, rape was the only crime named. Carnal knowledge has always been dealt with as a distinct and separate offense.

History of 1932 Amendment to Section 548, Title 18

The Amendment of 1932 was introduced at the request of the Department of the Interior. We quote in full the letter from the Secretary:

Department of the Interior,
Washington, April 23, 1932.

Hon. Lynn J. Frazier,
Chairman Committee on Indian Affairs,
United States Senate.

"My Dear Senator Frazier: There is inclosed herewith a draft of a bill to amend sections 328 and 329 of the United States Criminal Code of 1910, now sections 548 and 549, title 18, of the United States Code of 1926.

Those sections involve the question of the prosecution of Indians for offenses committed by them on

Indian reservations. Sections 2145 and 2146 of the United States Revised Statutes provide:

"Sec. 2145. Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian Country.

Sec. 2146. The preceding section shall not be construed to extend to (crimes committed by one Indian against the person or property of another Indian, nor to) any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

In view of said section 2146 the United States Supreme Court in the case of United States v. Crow Dog (109 U. S. 556) held in substance that an Indian could not be prosecuted by the United States courts for the murder of another Indian, or other offense committed by one Indian against the person or property of another Indian.

Following that decision, Congress in section 9 of the act of March 3, 1885 (23 Stat. 385)), made provision for the prosecution of Indians committing a few of the most serious offenses against other Indians on Indian reservations. Said act with some modifications became section 328 of the United States Criminal Code of 1910, now section 548 of title 18 of the United States Code of 1926, which provide for prosecution of Indians for only eight specific offenses, viz, murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny.

This has been the law for about 37 years, and there is now great need for making Indians subject to more of the laws governing other citizens or residents of the United States. For instance, some serious sases arise involving rape, assault with intent to commit rape, carnal knowledge, and incest which are not now punishable because, in Federal procedure, the common-law definition of rape is followed. There are inclosed herewith sample copies of correspondence in

regard to a few cases showing circumstances deserving prosecution and punishment to some extent at least, but where, as you will observe, there could be no prosecution because of the present state of the law.

While there is to be considered, sooner or later, the larger question of making Indians subject to the same laws as other persons, that involves careful consideration of a number of related problems, the consideration of which will undoubtedly bring out much discussion and difference of opinion as to what course of action to pursue. It will also probably involve the making of new and large appropriations, a procedure not desirable at this time.

Therefore, instead of waiting until we can satisfactorily present a bill covering the larger problem, we submit the inclosed draft to extend the laws to cover a few more of the serious offenses as set forth in the bill. The enactment of this bill will be an important step forward in the administration of Indan Affairs.

The paragraph extending the provisions of the bill to section 329 of the Criminal Code and section 549 of title 18 of the 1926 code is necessary by reason of the existing law as to South Dakota. Said section 329 was passed to meet legislation of the State of South Dakota ceding to the Federal Government jurisdiction for the prosecution of the offenses named when committed on Indian reservations by any person. The above-mentioned provision in the inclosed bill increases the list of crimes for which Indians in South Dakota may be punished, but does not attempt to extend Federal jurisdiction over offenses committed by other persons and not involving Indians. It would not be advisable to extend Federal jurisdiction over these additional offenses when committed by others than Indians (and not involving Indians) without the consent of the State to such legislation, nor is it desirable to extend Federal juricdiction to such cases.

It is respectfully recommended that your committee take the necessary steps to secure this legislation at the earliest possible date.

Very truly yours,

RAY LYMAN WILBUR, Secretary.[1]

[1]Source: Indian Affairs Committee Report—Calendar No. 802, Senate Report No. 746, 72d Congress, 1st Session.

Amendment As Finally Enacted:

The amendment, as it was finally enacted by the Congress, will be found as set out in the appendix to Title 18, Section 548, U. S. C.

The Bill As First Introduced

However, the bill, as first introduced in the Senate (on April 25—Calendar day, April 27, 1932), is in the following words and figures, and we quote the same from a photostatic copy of the said bill furnished us by the Secretary of the United States Senate, at our request:

72d CONGRESS
1*st Session* S. 4511

IN THE SENATE OF THE UNITED STATES

April 25 (calendar day, April 27), 1932

Mr. Frazier (by request) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs.

A BILL

To amend sections 328 and 329 of the United States Criminal Code of 1910 and sections 548 and 549 of the United States Code of 1926.

Be is enacted by the Senate and House of Representatives of the United States of America in Congress assembled,[1] That section 328 of the United States Criminal Code of 1910 and section 548 of title 18 of the United States Code of 1926 are hereby amended to read as follows:

1. Italics from Photostatic copy

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, carnal knowledge, assault with intent to kill, assault with intent to rape,

assault with a dangerous weapon, assault with intent to do great bodily harm, arson, burglary, robbery, and larceny on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: *Provided*,[1] That any Indian who commits the crime of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court: *Provided further*,[2] That as herein used the offenses rape and carnal knowledge shall be defined in accordance with the laws of the State in which the offense was committed.

"The foregoing shall extend to prosecutions of Indians in South Dakota under section 329 of the United States Criminal Code of 1910 and section 549 of title 18 of the United States Code of 1926."

1. Italics from photostatic copy
2. Italics from photostatic copy

The Bill with Committee Report

The bill, as finally recommended by the Committee and enacted by the Congress on (May 9—Calendar day May 28, 1932) is quoted below in accordance with the certified copy[3] of said bill received from Edwin A. Halsey, Secretary of the Senate of the United States of America.

> "I, EDWIN A. HALSEY, Secretary of the Senate of the Uunted States of America, do hereby certify that the typewritten page hereto attached is a true, correct, and compared copy of Senate bill 4511, Seventy-second Congress, first session, to amend sections 328 and 329 of the United States Criminal Code of 1910 and sections 548 and 549 of the United States Code of 1926, introduced in the Senate of the United States on April 25 (calendar day, April 27), 1932, by Mr. Frazier (by request), as reported by him from the Committee on Indian Affairs of the Senate, with amendments, on May 9 (calendar day, May 28), 1932; the matter proposed to be omitted by the committee being stricken through and the part proposed to be inserted being underlined.
>
> IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the Senate of the United States of America at the city of Washington, this the 1st day of September, A. D., 1944.
>
> (SEAL)
>
> EDWIN A. HALSEY,
> Secretary of the Senate of the
> Unite States.

3. Original certified copy certified to this Court as an exhibit

CALENDAR No. 802

72d Congress
1st session

S. 4511
(Report No. 746)

IN THE SENATE OF THE UNITED STATES
April 25 (calendar day, April 27), 1932

Mr. Frazier (by request) introduced the following bill; which was read twice and referred to the Committee on Indian Affairs.

May 9 (calendar day, May 28, 1932)

Reported by Mr. Frazier, with amendments

(Omit the part struck through and insert the part printed in italic)1*

A BILL

To amend sections 328 and 329 of the United States Criminal Code of 1910 and sections 548 and 549 of the United States Code of 1926.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 328 of the United States Criminal Code of 1910 and section 548 of title 18 of the United States Code of 1926 are hereby amended to read as follows:

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, incest, assault with intent to kill, assault with a dangerous wapon, arson, burglary, robbery, and larceny on and within any Indian reservation under the juris-

diction of the United States Government, including rights of way running through the reservation, shall be subject to the same laws, tried in the same courts, and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: "*Provided*, That any Indian who commits the crime of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court: *Provided further*, That as herein used the *offense rape* shall be defined in accordance with the laws of the State in which the offense was committed.

"The foregoing shall extend to offenses of Indians in South Dakota under section 329 of the United States Criminal Code of 1910 and section 549 of title 18 of the United States Code of 1926."

* Part inserted by committee is shown by underlined matter.

We thus see from the historical consideration of the amendment of June 28, 1932, that there was specifically recommended to Congress the amendment of Section 548, enacting a substitute for the said section, which said substitute was to include the offense of carnal knowledge.

The bill, as introduced, designated that as one of the offenses, and the Congress had full opportunity to so declare it to be one of the enumerated offenses. Observe, also, that incest is an offense not formerly punishable by the provisions of said section; likewise, that robbery is now included by the amendment as an offense.

How can we then justify the *omission* of carnal knowledge from the substitute act, when the proposed bill from the Department of the Interior had particularly included such words? The proposed bill also included the words "incest" and "robbery". They were permitted to remain in the bill as finally enacted. Certainly, Congress must have had a reason for omitting the words "carnal knowledge".

It must be remembered that when this Act was before Congress, it was referred to the Committee on Indian Affairs, and that the Congress had as the primary matter before it, the question of increasing the list of crimes committed by Indians against other Indians. The Congress was not at all concerned with amending or changing the general criminal laws of the United States as they applied to persons other than Indians, and we suggest that it stretches the bounds of imagination to conclude that the Congress, in dealing with an Act primarily concerned with Indians, intended thereby to impliedly repeal the specific provisions of Section 458, defining the crime of carnal knowledge.

No logical reasoning can be advanced to assert that the effect of the amendment of 1932, providing that the crime of rape shall be defined according to the law where the act was committed, was thereafter to include the crime of carnal knowledge in view of the then existing specific provisions covering that kind of offense, and the further fact that the Congress purposely excluded from the proposed bill the offense of carnal knowledge.

The legislation involved in the substitute for Section 548 was principally concerned and directed to Indians. It was not at all concerned with reference to the general criminal laws of the United States.

We think the case of *Washington vs. Miller*, cited supra, applies plainly here and we paraphrase the quotation hereinbefore cited from said case: *In short, it was plainly a general statute (relating to Indians) and did not show that the attention of Congress was then particularly directed to the consideration of amending the general or specific criminal laws of the United States. On the other hand, Section 458, Title 18, defining carnal knowledge, dealt with that subject in specific and positive terms which made it certain that the offense of carnal knowledge and the age of the female concerned were particularly in mind at the time.*

Following further, the reasoning in the *Washington vs. Miller* case, we suggest to the Court that where there are two statutes upon the same subject, (definition of crimes of sexual intercourse), the earlier being special and the later general, the presumption is, in the absence of an express repeal or an absolute incompatibility, that the special is intended to remain in force as an exception to the general.

Townsend vs. Little
109 U. S. 504
27 L. Ed. 1012

Rogers vs. United States
185 U. S. 83,
46 L. Ed. 816

Again, is there in this instance, any irreconcilable conflict or absolute incompatibility between the provisions of Section 548 as amended and Section 458? We think not, for both statutes could be given reasonable operation. There is no positive repugnancy between the provisions of the new amendment and the provisions of Section 458. In the words of *Ex-parte Kang-Gi-Shun-Ca*, cited supra, *there was no express reference in the new amendment to the previous legislation on the subject, and there being no necessary inconsistency between the two Acts, it must be ruled that the two Acts can stand together.*

We think it is clearly manifest from our analysis of the amendment that it certainly was not the intention of the Congress to effect the repeal of Section 458 or to re-define the ingredient elements constituting the crime of carnal knowledge.

The section with which we are now dealing, e.g., Section 548, prior to June, 1932, listed only eight crimes. In its present amended form, it enumerates ten crimes.

As may be inferred from Section 218, Title 25, U. S. C., other ordinary crimes committed by Indians against Indians in Indian country were subject to punishment by the local law of the tribe.

Indian Tribal Law to Apply

Inasmuch as Congress was here dealing with a matter which was brought to its attention as exclusively affecting the Indians, and inasmuch as it was referred to the Committee on Indian Affairs, it may well be argued that the Congress thought it wiser to leave

the matter of the offense of carnal knowledge to be dealt with by the local law of the tribe or the local Indian Courts in the Indian territory where the act was committed.

This argument presents itself to us as being much more reasonable than the contention that the effect of the amendment was to raise the statutory age of females from sixteen (16) to eighteen (18) with respect to carnal knowledge and thereby impliedly repeal Section 458.

SUMMATION

As to effect of S. 468.

It is manifest from the dissenting opinion below, (R-46), that the government must admit that said S. 468 cannot logically apply in those states where by law, age of consent is fixed at a lesser age than sixteen (16), but yet the government contends that said S. 468 will apply, in those states where an age higher than sixteen (16) is fixed by local law.

There is nothing in the history of S. 468 to indicate that Congress ever intended that S. 458, 18, U. S. C., was to be repealed or superseded.

Further, there is no indication that it was intended to be effective in certain areas of the United States and not effective in other parts of the country.

However, the result of the decision below does create this unique anomaly in our system of Jurisprudence.

As to effect of S. 548.

We submit that an historical analysis of the 1932 amendment to said section will reveal that it was not the intention of Congress thereby to alter or repeal the provisions of S. 458, 18, U. S. C.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory power in order that substantial justice shall be done, and that to such an end a Writ of Certiorari should be granted and that this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit and, finally, reverse it.

M. J. DOUGHERTY
Counsel for Petitioner

JOHN F. CONNOR
Of Counsel for Petitioner